Nos. 82-1264 and 82-1272

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE BROOKLYN UNION GAS COMPANY AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

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Questions Presented

The questions presented by the petitions for a writ of certiorari are:

1. Whether the Court of Appeals for the District of Columbia Circuit's *en banc* approval of the Commission's attribution and allocation rules, which are required by the Natural Gas Policy Act, consistent with the Natural Gas Act, and provide exemptions where necessary, presents any important and novel question warranting review by this Court.

2. Whether the Commission's continuance of an existing attribution rule and adoption of an allocation rule mandated by the Natural Gas Policy Act, neither of which have been applied to United Gas Pipe Line Company and which may never be applied to that company under the Commission's exemption procedure, presents a ripe case or controversy warranting this Court's intervention.

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BRIEF OF THE BROOKLYN UNION GAS COMPANY AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

Respondents The Brooklyn Union Gas Company (Brooklyn Union) and the Public Service Commission of the State of New York (New York) file this brief in opposition to

the petitions for a writ of certiorari submitted on behalf of the State of Louisiana (Louisiana) (No. 82-1264) and United Gas Pipe Line Company (United) (No. 82-1272).[1]

Opinions Below

Brooklyn Union and New York adopt the description of the opinions below contained in United's petition at 10-11. The opinion of the court of appeals is reported as *Process Gas Consumers Group* v. *United States Dep't of Agriculture*, 694 F.2d 728 (D.C. Cir. 1981), and the opinion of the court of appeals on rehearing *en banc* is reported at 694 F.2d 778 (1982).

Jurisdiction

Brooklyn Union and New York adopt the statement of jurisdiction contained in United's petition at 2. By letter of February 28, 1983, the Clerk of the Court extended the time for filing responses to the petitions for a writ of certiorari to and including April 4, 1983.

Statutes Involved

Brooklyn Union and New York adopt the statement as to the statutes involved contained in United's petition at 2-3.

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[1] The statement of Brooklyn Union's affiliates required by Rule 28.1 of this Court is contained in the footnote to the Brooklyn Union and New York application of February 5, 1983 for an extension of time within which to file this brief and is incorporated herein by reference.

Statement of the Case

The petitions filed by Louisiana and United seek review of the opinion of the court of appeals panel, adopted and reaffirmed by the *en banc* court on rehearing, upholding the attribution and allocation rules issued by the Commission in accordance with Title IV of the Natural Gas Policy Act[2] (hereinafter NGPA) to protect high priority and essential agricultural users from curtailment of supply.

Since 1970, the Commission and its predecessor, the Federal Power Commission,[3] have overseen the development and implementation of curtailment plans for interstate pipelines to apportion natural gas among their customers during supply shortages.

The NGPA was enacted in 1978. Title IV of the NGPA prescribes natural gas curtailment policies for interstate pipelines, to assure that pipeline sales for essential agricultural uses will not be curtailed unless the available pipeline gas supply is required to serve certain enumerated high priority uses.[4]

The Commission is required by the NGPA to establish procedures expeditiously to ensure that the curtailment plans of interstate pipelines effectuate the congressional policy embodied in the NGPA. These procedures were es-

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[2] 15 U.S.C. §§3391, 3393.

[3] The Commission succeeded the Federal Power Commission in 1977 pursuant to the Department of Energy Organization Act, 42 U.S.C. §§7101 *et seq.*

[4] 15 U.S.C. §§3391-3394.

tablished by the Commission in its Order No. 29, as amended.[5]

Two of the procedures prescribed by the Commission were challenged by United and Louisiana before the court below. First, they attacked the mechanism adopted by the Commission for the *attribution* by pipelines of their customers' *requirements* among their customers' various suppliers. Second, they contested the mechanism for the *allocation* by pipelines of their *supplies* among the pipelines' customers in times of shortage.

Since many pipeline customers receive gas from more than one source, the mere approval of a curtailment priority system has no meaning in the absence of a mechanism to attribute the market requirements of such customers to their various suppliers for the purpose of curtailment. The court of appeals panel noted that the attribution rule adopted by the Commission[6] traces the actual dependence of end users:

> [Where a customer receives gas from more than one supplier] each pipeline is responsible for supplying a proportion of the customer's high-priority gas needs equal to the pipeline's percentage contribution to the customer's total needs during the base period.[7]

This rule merely preserves and continues the existing attribution mechanism utilized by virtually all interstate

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[5] Order Nos. 29 (J.A. 139-242), 29-A (J.A. 243-53), 29-B (J.A. 254-68), and 29-C (J.A. 269-327). References to items contained in the Joint Appendix filed with the Court by Petitioners are cited as "J.A."

[6] 18 C.F.R. §281.209.

[7] 694 F.2d at 743 (footnote omitted).

pipelines (including United) prior to enactment of the NGPA:

> The attribution formula as applied by distribution companies and interstate pipelines was intended to allow attribution in the same manner as was done in the underlying curtailment plans of interstate pipelines.[8]

In addition to this mechanism for attributing requirements, it was necessary for the Commission to adopt a gas allocation rule to carry out the NGPA's mandate that high-priority users (priority 1) and essential agricultural users (priority 2) be afforded maximum protection from curtailment.[9] To accomplish this, the Commission provided:

> All deliveries to all customers of the interstate pipeline for all volumes of natural gas not included in priority 1 and 2 shall be fully curtailed by the interstate pipeline before priority 1 and 2 entitlements are curtailed.[10]

The Commission expressly recognized that these attribution and allocation rules might not be the most appropriate approach for all affected pipelines, and provided that, upon a proper showing, it would approve deviations from one or both rules.[11]

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[8] Order No. 29-C (J.A. 297-98).

[9] Section 401(a) of the NGPA, 15 U.S.C. §3391(a).

[10] 18 C.F.R. §281.205(b).

[11] Order No. 29-C (J.A. 288-89, footnotes omitted). Adjustments are obtained pursuant to section 502(c) of the NGPA, 15 U.S.C. §3412(c) and 18 C.F.R. §1.41.

The attribution and allocation rules adopted by the Commission apply to thirty-eight interstate pipelines,[12] but only United and Louisiana sought review of these rules by the court of appeals. Although United and Louisiana couch their arguments in terms of the effect of these rules on all pipelines generally, the petitions to this Court concern application of the rules to *only* United's pipeline system.

On review, a unanimous panel of the court of appeals held that the portions of the Commission's orders at issue here fall within the Commission's regulatory powers and that the remaining "arguments are premature given the acknowledged availability of an adjustment procedure." 694 F.2d at 744. The court dismissed petitioners' argument that sections 4 and 5 of the Natural Gas Act (hereinafter NGA) left pipelines complete discretion to file tariff revisions without any regulatory restraint, holding that the applicable statutes and decisions of this Court[13] permitted the Commission "to announce constraints on tariff filings in the form of rules, though it must accept or reject rates on their individual merits." 694 F.2d at 746 (footnote omitted).

This part of the panel's decision ("Part I.C."), along with others, was vacated by the court of appeals in granting rehearing *en banc*. Following additional briefing and

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[12] Order No. 29 (J.A. 169); 18 C.F.R. §281.202.

[13] *Permian Basin Area Rate Cases*, 390 U.S. 747, 777-81, *reh'g denied*, 392 U.S. 917 (1968); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964). Significantly, although United (pet. at 13) and Louisiana (pet. at 24) contend that Order No. 29 and the decision below necessarily conflict with the standards of NGA section 4(b), as interpreted in *North Carolina* v. *FERC*, 584 F.2d 1003 (D.C. Cir. 1978) and similar cases, the panel which heard and decided *North Carolina*, all of whom joined in the *en banc* decision in this case, perceived no such conflict.

oral argument on this issue, the *en banc* court adopted Part I.C. of the panel's opinion as its own opinion, endorsing "the panel's view that the Commission's specific grants of authority under sections 401, 402, 501 and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act. . . ." 694 F.2d at 783 n.3. The court stated that "[a]bsent a ripe case or controversy regarding the application of section 502(c)" it would refrain from passing upon "the scope of the Commission's authority in a section 502(c) proceeding." *Id.*

Reasons for Denying Writ

The petitions filed by United and Louisiana attempt to portray the rulings of the court below, affirming the Commission's gas curtailment attribution and allocation rules, as involving substantial questions of law and policy of significance to the administration of the Natural Gas and Natural Gas Policy Acts. In fact, the court of appeals' affirmance of the rules, in the absence of any showing of abuse of the adjustment procedure adopted by the Commission for treatment of atypical or unique situations, was fully consistent with the holdings of this Court in analogous situations. Moreover, far from presenting an issue of general significance to ongoing regulation of natural gas pipelines, the decision below is of conjectural concern at best to only one of the thirty-eight interstate pipelines affected by the rules, since that pipeline has already sought and received a timely adjustment under the very procedure it challenges as inadequate.

1. The prescription by the Commission of attribution and allocation rules for implementation of Title IV consti-

tuted only "the limited reopening of established plans to implement a discrete change" as mandated by the NGPA.[14]

It is far too late in the day to suggest that because section 4 of the NGA authorizes initiation of changes in pipeline tariffs by pipeline filings, and authorizes the pipeline to place the new tariff in effect at the end of the suspension period, the Commission may not adopt general standards which, if applied, would require rejection of the filing or some aspect thereof. As long ago as the Court's opinion in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), it was determined that a statutory "right" to a hearing on application did not preclude the Federal Communications Commission from proscribing any application for a license for a radio station in excess of a specified limit as long as there was available to the applicant an opportunity to seek waiver or amendment of the prohibitory rule.

This concept has been expressly applied by the Court to general rules of the Commission which would preclude inconsistent rate applications under section 4 of the NGA. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 777-81 (1968) (section 4 not violated by a moratorium on rate increases above a fixed ceiling since relief is available through Commission's provision for special exemptions and motion for termination or modification of moratorium); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964) (section 4 does

[14] Order No. 29-C (J.A. 289-90). The Commission's continuance of an existing attribution practice and adoption of an allocation rule mandated by the NGPA was not prescriptive of a detailed, comprehensive curtailment plan, as suggested by petitioners. Rather, these actions were necessary elements of the Commission's responsibility, under NGPA section 403 (b), to implement the limited reordering of curtailment priorities promulgated by the Secretary of Energy.

not preclude FPC from issuing regulations providing for summary rejection of contracts with pricing provisions other than those specified in the regulations as being permissible).[15]

The burden placed on a pipeline to justify departures from the prescribed attribution and allocation rules is, in substance, no greater or different than the burden already placed on pipelines by section 4 of the NGA to demonstrate the justness and reasonableness of their curtailment plan filings.[16]

2. The Commission recognized that the rules adopted in Order No. 29 might not be the most appropriate approach for all affected pipelines, and provided that any pipeline could seek an adjustment or propose a settlement utilizing a different mechanism:

> In applying Order No. 29, the Commission has not been inflexible. Where the rule was obviously unsuited to the system of a particular pipeline, it has not been applied. The Commission has also evinced flexibility in molding curtailment plans in the settlement context.

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[15] Although pipelines, as a general proposition, remain free to file tariffs of their own choosing pursuant to section 4 of the NGA, the NGA (sections 4(c) and 16) and NGPA Title IV make clear that this freedom does not remain totally unfettered. The essentially unlimited discretion advocated by petitioners here would effectively allow pipelines to unilaterally nullify NGPA Title IV for extended periods (for which the "refund" remedy provided by NGA section 4 would be meaningless).

[16] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1972) ("In these [section 4] hearings, the pipeline has the burden of proving that its plan is reasonable and fair").

> If petitioners believe the rule unsuited to individual pipeline curtailment plans, the appropriate avenue for relief is a 502(c) adjustment or offer of settlement, not rehearing of the rule.[17]

It is possible that an adjustment may be required in the future for the United system.[18] But the Court teaches that a workable rule should not be discarded when the rule itself contemplates and can provide the relief which might be required.[19]

It cannot seriously be suggested that the Commission will not give adequate consideration to any properly supported request for an adjustment by United or Louisiana should they believe some variance from the attribution or allocation rules is required and can be supported. On the contrary, United requested and received a timely interim adjustment relieving it from compliance with the provisions of Order No. 29 pending Commission consideration of a curtailment settlement proposal (supported, *inter alia*, by United, Louisiana, Brooklyn Union and New York) which deviated in material respects from Order No. 29.[20]

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[17] Order No. 29-C (J.A. 288-89, footnotes omitted).

[18] Any situations where unique circumstances require special distinctions between United's "full" and "partial" requirements customers to protect high priority requirements can be accommodated under the rule's procedures.

[19] *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972) *citing Permian Basin Area Rate Cases*, 390 U.S. 747, 784-86 (1968).

[20] *United Gas Pipe Line Co.*, Docket No. SA80-4, Order of the Director Office of Pipeline and Producer Regulation Granting Interim Relief and Petitions to Intervene and Staying Proceeding (Oct. 31, 1979).

The settlement proposal was subsequently approved by the Commission in an order which expressly granted United "an exemption from Order No. 29 requirements pursuant to Section 502(c) of the NGPA."[21]

As noted by the court of appeals, "petitioners have presented no evidence of any abuses in their [the attribution and allocation rules and the adjustment procedure] implementation."[22] The Commission assured the court below that "adjustments have been granted promptly."[23]

The attribution and allocation rules could affect United or Louisiana only if United sought to change its existing curtailment plan in a manner requiring an adjustment of the rules, and the Commission denied such an adjustment. This appears unlikely, for at least the foreseeable future.[24]

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[21] *United Gas Pipe Line Co.*, Docket Nos. RP71-29-000, *et al.*, Opinion No. 150 (Oct. 8, 1982), 21 FERC ¶61,016 at 61,087, *reh'g denied* Opinion No. 150-A (Nov. 29, 1982), 21 FERC ¶61,224, *petition for review pending sub nom. Mississippi Power & Light Co.* v. *FERC*, No. 82-4444 (5th Cir.).

[22] 694 F.2d at 746.

[23] 694 F.2d at 783 n.3.

[24] United's Vice President for Sales has advised the parties by letter of March 18, 1983 that, based upon its current estimates for the three-year period commencing November 1, 1983, "United does not anticipate that it will be required to curtail deliveries to its customers during the forecast period except possibly on severe peak days." United has proposed no change in its existing curtailment plan (or its current exemption from the provisions of Order No. 29) for this three-year period.

In short, the attribution and allocation rules articulated by the Commission expressly contemplate adjustments in appropriate circumstances, and nothing in the United and Louisiana petitions suggests any reason for believing that the Commission will refuse to grant any adjustment required to facilitate a just and reasonable curtailment plan for the United system.

If at some future time the Commission were arbitrarily or unlawfully to refuse to grant an adjustment sought by petitioners, they will have a full opportunity to seek redress at that time.[25]

[25] *Permian Basin Area Rate Cases*, 390 U.S. at 772.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THE BROOKLYN UNION GAS COMPANY
and THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

By: /s/ JOSEPH P. STEVENS

April 4, 1983

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